STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GALE LYNN FISHELL,

Defendant-Appellant.

UNPUBLISHED
April 3, 2003

No. 230878
Van Buren Circuit Court
LC No. 00-011806-FC

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. He was sentenced to twenty to forty years, thirty-eight to sixty months, and a consecutive two-year term, respectively. He appeals as of right, raising claims of instructional error and ineffective assistance of counsel. We affirm, but remand for correction of the sentence.

I

It is uncontroverted that the victim, who was a friend of defendant's, was shot nine times with a semi-automatic gun. There was evidence that defendant was intoxicated. Defendant gave varying accounts of what transpired. He told his former girlfriend that he had gotten into a fight with the victim and had shot him. He told a friend that someone he knew had pulled a gun on him and he shot him. He told police that he had handed the gun to the victim when it accidentally discharged. He also told police that he picked up the gun to show the victim, that both were drunk, that he handed the gun to the victim and that they started to wrestle over it when it fired. He also suggested that he may not have been touching the gun when it discharged. He also stated that he got the gun to show the victim and that he was standing in the living room when he heard a loud noise and saw that the victim was against the couch, shot bad. He said he leaned the gun against the wall, but did not remember shooting the victim. He also said that they had been drinking, that there was an argument, and that he picked up the gun and shot the victim. He then said that he did not remember shooting the victim, and did not think that he did. He also stated that the victim may have had a gun or a knife, and he may have been defending himself. He concluded by repeating that he heard a noise and did not remember shooting the victim.

Defendant introduced evidence through a firearms expert that although the gun was semi-automatic and required that the trigger be pulled nine times to expel nine bullets, the trigger would only have to be depressed ¼ to ½ inch, nine shots could be fired in 1.8 seconds, and inexperienced shooters commonly have less difficulty firing such a weapon quickly and think the "gun has gone full automatic because they don't realize they are pulling the trigger it happens so quickly."

The prosecutor's theory was that defendant intentionally shot the victim in the torso nine times. Defendant's theory, as presented in opening statement, was that defendant and the victim were friends and had spent the day together drinking, and that defendant was too intoxicated to accurately report what had happened, but that he did not intend to kill the victim, to do great bodily harm to the victim or to knowingly create a very high risk of death or great bodily harm. Defense counsel stated that it would be reasonable for the jury to find that there was careless discharge of a firearm causing death. In closing argument, defense counsel argued that the prosecutor had not proved beyond a reasonable doubt that defendant had any of the three intents necessary to convict of second-degree murder.

II

Defendant first claims that the trial court committed error warranting reversal by refusing his requests to instruct the jury on voluntary manslaughter[1] and careless discharge of a firearm causing injury or death. Voluntary manslaughter is the intentional killing of a person committed in the heat of passion, brought on by adequate provocation, and before a reasonable time has elapsed for the actor to regain control (for the blood to cool). *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991); *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Voluntary manslaughter is a cognate lesser offense of murder, distinguished from it by the presence of adequate provocation. *Pouncey*, *supra.* Careless discharge is defined as:

> Any person who, because of carelessness, recklessness or negligence, but not willfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison for not more than 2 years, or by a fine of not more than $2,000.00, or by imprisonment in the county jail for not more than 1 year, in the discretion of the court. [MCL 752.861.]

Careless discharge of a firearm causing injury or death is also a cognate lesser offense of murder. *People v Heflin*, 434 Mich 482, 496 n 10; 456 NW2d 10 (1990).

[1] While defendant's statement of this issue refers to manslaughter generally, defendant concedes that counsel did not request an instruction on involuntary manslaughter under MCL 750.329 or MCL 750.321. To the extent that defendant argues that the court erred in not instructing on involuntary manslaughter, we must reject this argument under MCL 768.29, which provides that reversible error must be based on the trial court's failure to give a *requested* instruction.

In *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), the Supreme Court modified the rules to be applied in determining whether an instruction on a lesser offense should be given. The Court determined that only instructions on necessarily included lesser offenses are to be given under MCL 768.32(1);[2] that an instruction is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it, and that these principles apply to misdemeanor lesser offenses as well as felony lesser offense. *Cornell, supra* at 354-357. Additionally, the Court applied a harmless error standard that inquires whether the defendant has demonstrated that it is more probable than not that the failure to give the requested instruction undermined reliability in the verdict, *id*. at 364, by showing that the evidence "clearly" supports the lesser included instruction, i.e., that in examining the entire cause, there is substantial evidence to support a conviction of the lesser offense rather than the greater. *Id.* at 365-366.

Applying *Cornell*, we find no error. Careless discharge is a cognate lesser offense of murder and therefore no instruction on this offense need be given. Voluntary manslaughter is also a cognate lesser offense of murder. However, there is reason to believe that the Supreme Court did not intend *Cornell* to alter the long-standing common-law rule that manslaughter is a "lesser degree" of murder. The *Cornell* Court quoted at great length from Justice Christiancy's opinion in *Hanna v People*, 19 Mich 316, 321-322 (1869), and approved of and relied on that opinion. *Cornell, supra* at 353-354. The *Hanna* Court made explicit that under the statutory provision and at common-law, a conviction for manslaughter is appropriate where the charge is murder. *Hanna, supra* at 321-322. Thus, because it is unclear whether the *Cornell* rule regarding lesser cognate offenses applies to common-law manslaughter, we continue with our analysis.

Assuming a voluntary manslaughter instruction should have been given, we find no reversible error in the court's refusal to give the requested voluntary manslaughter instruction in the instant case. Applying the standard enunciated in *Cornell, supra* at 365-366, on the entire record, defendant's statements did not provide substantial evidence that defendant acted in the heat of passion, brought on by adequate provocation, and before a reasonable time had elapsed for defendant to regain control. On this record, we are unable to conclude that the failure to give the instruction undermined reliability in the verdict. *Cornell, supra* at 364-366.

III

As a subissue of the instructional issue, defendant also argues that the trial court's statements to the jury, in essence, directed a verdict of guilt of second-degree murder. After

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[2] MCL 768.32(1) provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

instructing the jury that it had dismissed the first-degree murder charge for lack of evidence of premeditation, the court stated to the jury:

> The Court has likewise declined to include as a lesser offense careless or reckless discharge of a firearm without wantonness or willfulness causing death and that lesser included offense I excluded from your consideration for the same reason, that the Court determined there were no genuine issues of fact to determine that would allow a reasonable jury to conclude that such a crime was committed in this case. In the same vein, the Court has already declined to include voluntary manslaughter. And the reasoning of the Court was the same there, there was no evidence to show a disturbed thinking, emotional excitement to the point that an ordinary person might have acted on impulse without thinking and that as a result of such emotional excitement before a reasonable time had passed to calm down and return to reason, the defendant killed [the victim]. The Court did not feel there was evidence to support those facts, so you have one option as to Count I, guilty of second-degree murder or not guilty.

The trial court's statements to the jury are indeed troubling and would have been better left unsaid. Defendant was entitled to have the jury decide all the disputed elements of the offense. In this case, the focus was on defendant's state of mind. The court's statement that there were no genuine issues of fact to determine that would allow a reasonable jury to conclude that the crime of careless and reckless discharge of a firearm without wantonness or willfulness had been committed could be seen as undermining defendant's defense. However, the issues were clearly presented to the jury in that the jury was instructed that it had to find beyond a reasonable doubt "that defendant had one of these three states of mind. He intended to kill, intended to do great bodily harm to [the victim] or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions." Defense counsel directed his closing argument to the prosecutor's failure to prove any of the three states of mind beyond a reasonable doubt. He did not base his argument on a jury finding that defendant was only careless or reckless, but not willful and wanton. Under these circumstances, we conclude that, while ill-advised, the court's statement to the jury did not amount to a directed verdict.

IV

Defendant next argues that counsel was ineffective in not requesting an instruction on statutory involuntary manslaughter[3] and in conceding defendant's guilt of the crimes charged.[4]

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[3] MCL 750.329 provides:

> Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficiency was so prejudicial that he was deprived of a fair trial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show the required prejudice defendant must demonstrate a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different. *Id.*

We reject defendant's argument that counsel was ineffective in conceding defendant's guilt. Counsel's approach in opening was to concede that defendant was guilty of being a felon in possession of a firearm, and to assert that the offense of murder would not be proved. This was a reasonable strategy. Further, counsel did not concede that defendant was guilty of felony firearm, and certainly not in connection with first- or second-degree murder.

While counsel's failure to request the statutory involuntary manslaughter instruction may be seen as objectively unreasonable,[5] we cannot find the required prejudice where the court had no obligation to instruct on this cognate offense under *Cornell*.[6]

V

Lastly, defendant argues that the trial court erred in ordering that his felony-firearm sentence be served consecutively to his felon in possession sentence as well as his sentence for second-degree murder. The prosecution concedes the error, and we therefore remand for correction of the sentence.

(…continued)

[4] Defendant makes the latter claim in a brief filed in propria persona.

[5] Counsel's strategy was to admit that the victim died as the result of shots fired by defendant, but to challenge the existence of malice, and to explain through a firearms expert how one might discharge the weapon nine times without intending to do so. While counsel did not directly concede that defendant intentionally pointed or aimed the firearm at the victim, the prosecution so maintained, and there was evidence to support this conclusion. The trial court having denied the request for a careless discharge instruction, and the disputed issue having been reduced to the presence or absence of malice, we can perceive no strategy behind counsel's failure to request that the court instruct on the statutory involuntary manslaughter offense, except perhaps to avoid focusing the jury's attention on whether, or making a concession that, the firearm was intentionally aimed.

[6] Our reservations regarding whether the *Cornell* Court's pronouncement with regard to lesser cognate offenses applies to common-law manslaughter, based on the *Cornell* Court's discussion of *Hanna*, cannot be extended to the cognate offense of statutory involuntary manslaughter. While *Hanna* unequivocally considered manslaughter "included in the charge" of murder, taking into account the language of *Cornell*, we cannot say that the charge of murder includes the charge of statutory involuntary manslaughter (death resulting from a firearm intentionally aimed, but without malice).

Affirmed, but remanded for correction of the sentence.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens